IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .

FIDELITY-PHILADELPHIA TRUST COMPANY, and ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased,

Petitioners,

v.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue for the First District of Pennsylvania,

Respondent.

PETITION

FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Third Circuit entered May 15, 1944, affirming the decree of the District Court of the United States for the Eastern District of Pennsylvania entered January 8, 1943.

Opinions Below.

Neither the opinion of the Circuit Court of Appeals nor the opinion of the District Court are reported. Both are printed in this record.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938. The opinion of the Circuit Court of Appeals for the Third Circuit was filed May 15, 1944. The mandate has been stayed until July 29, 1944.

Questions Presented.

The questions are whether an irrevocable transfer in trust by the decedent on March 26, 1928, with life income and a remote power of appointment reserved was intended to take effect in possession or enjoyment at or after her death within the meaning of Section 302(c) of the Revenue Act of 1926 and, if it was, whether the entire value of the corpus should be included in decedent's gross estate for estate tax purposes or whether the value of intervening estates should be deducted.

Summary Statement.

On March 26, 1928, Anna C. Stinson created an irrevocable trust of about one-seventh of her property. By the trust she reserved the income to herself for life, then to her two daughters for life and upon the death of each daughter to pay the principal to her then living descendants. There were cross remainders and in case both daughters died without descendants the principal was to go as settlor should appoint by will, and in default of appointment to four named charities.

When settlor created the trust she was a widow forty-five years old and in good health. Her daughters were aged ten and twelve years. She died suddenly of heart disease over six and one-half years later on November 17, 1934, at the age of fifty-one. Following audit of the estate tax return, the value of the trust property was included in her gross estate and this suit is brought to recover the additional estate tax thus paid. The trust was found not made in contemplation of death.

The District Court gave decision for the defendant on the ground that the trust was testamentary in character. The Circuit Court of Appeals for the Third Circuit affirmed on the ground that the retention of the power of appointment by will held in suspense the ultimate disposition of the fund until settlor's death and that under the Hallock case the whole value of the trust must be included in the gross estate.

The will contained a provision that if both daughters died without descendants the estate was to go to her brothers and sister for life and then to four charities absolutely. Both courts ignored the plaintiff's additional contention that if the reservation of the power of appointment over the remote remainder, valued on the evidence at 1.25% of the principal, was sufficient to color

the entire trust as testamentary, its exercise with substantial entirety to charity was sufficient to warrant a charitable deduction in the same measure.

Reasons for Granting the Writ.

The decision is stated to rest upon the Hallock case[1]. In that case (or more accurately in those cases) the settlor provided that if the life beneficiary predeceased him the principal should come back to himself and this possibility was not dissolved until his own death before the life tenant. In the case at bar there is no possibility that the principal or any interest therein (other than the reserved life estate) could ever come back to the settlor and her testamentary power of appointment had substantially no value because of the intervening life estates to the two daughters and the absolute remainder to their descendants. The Hallock case is therefore, on its facts quite different. The only common elements are found in the so-called "string" retained by the settlor. In the Hallock case this reservation was substantial and was to the settlor himself. In this case the settlor kept nothing for herself except her life estate which is to be disregarded as an element in the case if May *v.* Heiner[2] is to be regarded as law. Therefore petitioners submit the decision in this case is contrary to the Hallock case and to May *v.* Heiner.

There was undisputed evidence in this case that on the date of the settlor's death the value of the remainder after the deaths of the two daughters was 14% of the

[1] Helvering *v.* Hallock, 309 U. S. 106 (1940).
[2] May *v.* Heiner, 281 U. S. 238 (1930).

principal, and its value after exhaustion of the possibility that the line should die out was 1.25% thereof. In all the "Hallock" cases the value of the intervening life estate was deducted. The regulations, following Treasury Decision 5008 amending them after the Hallock case, provide for the deduction of the "outstanding" life estate. The life estates of the two daughters were "outstanding" on her death or else her own life estate was outstanding. There was no moment when one or the other was not "outstanding". The value of one or the other ought to be deducted if the result of the Hallock cases is followed. For this further reason it is submitted the decision in this case is contrary to the Hallock cases.

While the decision in this case purports to recognize that May *v.* Heiner and Hassett *v.* Welch[2] are valid decisions, in effect it is contrary to them because it states (R. 86) "Since the disposition of the estate was held in suspense until her (settlor's) death that event compels the imposition of the tax." In fact all but a very remote and almost valueless interest was irrevocably disposed of by the trust indenture before settlor died. Therefore petitioners submit this decision is contrary to May *v.* Heiner and Hassett *v.* Welch.

The decision in this case purports to recognize May *v.* Heiner and Hassett *v.* Welch but contains the statement in the opinion "since the disposition of the estate was held in suspense until her (settlor's) death that event compels the imposition of the tax". In effect, therefore, the court has disregarded May *v.* Heiner and Hassett *v.* Welch and is inconsistent with the cases of

New York Trust Company et al v. United States, 51 Fed. Sup. 733 (1943), and
Helvering v. Proctor, 140 Fed. (2d) 87 (1944) C. C. A. 2.

The case of New York Trust Company *v.* United States was decided by the Court of Claims on October 4,

[2] Hassett *v.* Welch, 303 U. S. 303 (1937).

1943, and holds that the reservation of a life interest is not sufficient to render a trust taxable to the estate of the settlor where the trust was created before the time of the joint resolution. The Court of Claims expressly recognizes May *v.* Heiner and Hassett *v.* Welch and is, therefore, inconsistent with the decision in this case.

The Proctor case is to the same effect and is noteworthy in that its facts correspond to the case at bar except that the settlor had a power of disposition on failure of the family line without express reservation whereas in the case at bar there was an express reservation.

A further reason for granting the petition is that the present case is entirely out of harmony with a number of decisions by this Court which outline the application of the gift and estate taxes. The case of

Estate of Sanford v. Commissioner, 308 U. S. 39 (1939),

holds that the gift tax supplements the estate tax.

Rasquin v. Humphreys, 308 U. S. 54 (1939).

This case holds that the retention of a remote possibility of recovering the trust property will not free it from the gift tax.

Humes v. U. S., 276 U. S. 487 (1928).

This case holds that a charitable remainder effective only under remotely possible circumstances will be disregarded.

Smith v. Shaughnessy, 318 U. S. 176 (1943).

In this case a settlor placed property upon trust for his wife with remainder to others subject to the provision that if the wife predeceased the grantor the property should come back to him. This Court held that only the life estate to the wife was a valid gift and only that should be taxed.

Robinette v. Helvering, 318 U. S. 184 (1943).

In this case there was a trust with a reversion to the settlor after the death of a daughter without issue. This Court held the entire principal subject to gift tax, the remote reversion being too small to be considered.

It is submitted that a remotely possible reversion or power of control if disregarded for gift tax purposes and if disregarded for the purposes of a charitable deduction should also be disregarded for estate tax purposes. The present case cannot be reconciled with the decisions of this Court cited above.

Lastly, it is the opinion of the petitioners that the questions involved in this case are of importance in the administration of the federal estate tax. The importance of the question is demonstrated by the number of cases which have come before the Tax Court and resulted in decisions favorable to the taxpayer on facts which are not essentially different from the case at bar except that there was not reserved to the settlor any life interest in the income. Under May *v.* Heiner and Hassett *v.* Welch this circumstance is to be disregarded in this case. These cases are as follows:

Estate of Lester Hoffheimer v. Commissioner, 2 T. C. No. 99 (1943);

Estate of Mabel H. Houghton v. Commissioner, 2 T. C. No. 110 (1943);

Estate of Ellen Portia Goodyear v. Commissioner, 2 T. C. No. 112 (1943);

Estate of Tully C. Estee v. Commissioner, T. C. Memorandum (P-H Memorandum Service Par. 43,420) (1943);

Estate of Smith M. Flickinger v. Commissioner, T. C. Memorandum (P-H Memorandum Service Par. 43,455) (1943).

Therefore, petitioners submit that the Court may well take jurisdiction of this case,

(1) because of its importance as announced in the case of

Helvering v. Safe Deposit and Trust Co., 316 U. S. 56 (1942);

(2) because this decision is inconsistent with the Hallock case where the value of the reverter alone was included in the taxable estate;

(3) because there is a conflict among the Circuits demonstrated by the Proctor case;

(4) because this decision is contrary to the decisions of this Court in May *v.* Heiner and Hassett *v.* Welch; and

(5) because the decision stands upon a remote interest held too distant for consideration for gift tax purposes in Robinette *v.* Helvering and in Humes *v.* U. S., for estate tax purposes.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

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